

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-4192

78-6032

BEFORE THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 78-6032

CENTRAL HUDSON GAS & ELECTRIC CORPORATION, et al.,

Plaintiffs-Appellants

-against-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants-Appellees.

Docket No. 77-4192

CENTRAL HUDSON GAS & ELECTRIC CORPORATION, et al.,

Petitioners,

-against-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

PETITION FOR REHEARING IN BANC
AND PETITION FOR REHEARING

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Dated: New York, New York
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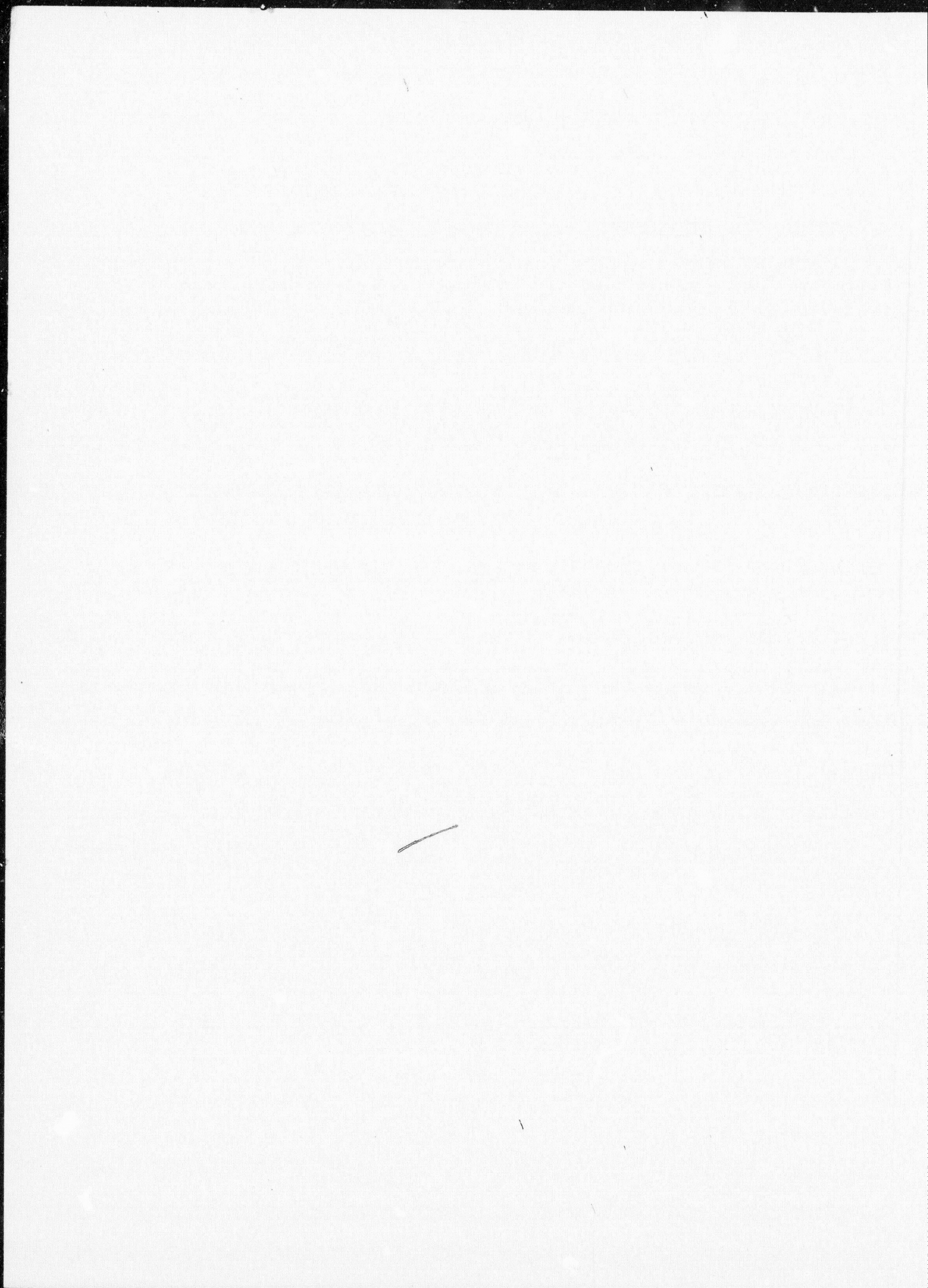
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Docket Nos. 78-6032 and 77-4192

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
et al.,

Plaintiffs-Appellants, Petitioners,

-against-

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
et al.,

Defendants-Appellees, Respondents.

PETITION FOR REHEARING IN BANC
AND PETITION FOR REHEARING

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, Plaintiff-Appellants Central Hudson, et al. ("Utilities") respectfully petition for rehearing and petition the Judges of this Court who are in regular active service for rehearing in banc of part of the decision entered herein November 3, 1978. The panel which heard and decided this matter was sharply divided on one issue.*

* Judge Meskill, with Judge Feinberg concurring in a separate opinion, held for Defendants. Judge Brieant, sitting by designation, dissented. We understand Rule 35, Federal Rules of Appellate Procedure, to authorize Judge Brieant to request the judges in regular active service on this Court to vote on whether rehearing in banc should be granted, but that the rule does not permit him to participate in that vote.

This petition raises a fundamental matter of federalism under our Constitution. The question is whether the United States or New York State has jurisdiction over issuance of certain permits. It is suggested that rehearing and rehearing in banc is appropriate as to the single basic issue of law upon which the members of the panel disagreed.

Background

The majority opinion gives the background (Slip opinion, pp. 5065-8).^{*} Utilities must obtain NPDES permits under §402 of the Federal Water Pollution Control Act (33 U.S.C.A. §1342) for continued lawful operation of six electric generating units on the Hudson River. They applied for permits in 1971 and 1974. In February 1975 the U.S. Environmental Protection Agency ("EPA") published notices of final determination requiring that Utilities build six cooling towers on the Hudson River by the early 1980's and imposing other conditions authorizing operation of the plants in the interim (see JA 87, 114, 147, 168). Utilities contested the cooling tower and related requirements, and EPA ordered that adjudicatory hearings be held (JA 199, 213, 225, 237). Then, in November 1975, EPA determined under §402(b) of the Act that the New York State Department of Environmental Conservation ("DEC") was qualified to administer its own permit program (JA 250). According to §402(c) of the Act (33 U.S.C.A. §1342(c)):

* References are to the printed slip opinion. Further background can be found in Utilities' Brief of March 28, 1978 at pp. 4-20 and the Affidavit of Joseph D. Block, JA 72-86.

"Not later than ninety days after the date on which a State has submitted a program...the [EPA] Administrator shall suspend the issuance of permits...unless he determines that the State permit program does not meet [the Act's standards]" (emphasis added).

Despite this mandatory language, EPA refused to suspend the proceedings with respect to issuance of the contested permit conditions to the Utilities. At EPA's initial pre-hearing conference in February 1977 on the consolidated permit matters, Utilities objected to EPA's refusal, pointing out that DEC, not EPA, had jurisdiction over the permits. The question was referred to EPA's General Counsel, who rejected Utilities' position in a decision (JA 35) served on Utilities on August 11, 1977 (JA 81-82). Thereupon, Utilities commenced an action in the District Court, seeking injunctive and declaratory relief (JA 16), and Utilities filed a protective petition for review in this Court (JA 622).

The panel heard the consolidated appeal from the District Court's order of dismissal, and the petition for review. It unanimously reversed the District Court. It unanimously agreed that Utilities' claim was properly before it on appeal, and was now ripe for decision. The panel further agreed with Utilities that it should reach the issues not decided by the District Court.

The panel explicitly recognized the great public importance of the underlying issues and the need for prompt resolution of the main question presented--whether the United

States or New York State has jurisdiction. This great importance, of itself, warrants granting rehearing in banc.

Issue

The only question presented by this petition is whether Congress truly meant that EPA was required to "suspend"--to stop--the process of permit issuance to Utilities upon transfer of the permit program to DEC. When Congress wrote that EPA "shall suspend the issuance of permits", did it mean "may suspend"? Did it intend that EPA could hold back "bits and pieces" of its authority and prevent the State from carrying out its "primary" responsibility to implement the permit program?

Judge Meskill decided that he should balance Congress' stated policy that States should implement the program against the Act's objective of restoring and maintaining clean waters: He decided that the policy of State implementation should be "sacrificed" (Opinion, p. 5086). Judge Feinberg concluded that "Congress simply could not have intended the wasteful and awkward transition that Utilities believe is required here" (concurring opinion, p. 5090).

The dissenter, on the other hand, found that Congress meant what it said. No balancing is called for, because there is no inherent conflict between the Act's objective and the policy that qualified States carry out the objective. Congress said that EPA "shall suspend the issuance of permits". The word "shall" is mandatory as a matter of plain meaning.

Further, Congress in 1972 wrote express policy in §101(b) (33 U.S.C.A. §1251(b)) that States are primarily responsible to carry out the Act. Congress reemphasized this policy in the 1977 amendments to the Act, when it added "it is the policy of Congress that the states...implement the permit programs..."*. Judge Brieant pointed out that the legislative history fully confirms that Congress intended EPA to cease forthwith its own issuance of permits once a State is found qualified, and that EPA is directed not to give the States just "bits and pieces" of the program (dissent, pp. 5094-5). The majority's fear that waste, duplication, and delay would flow from State administration of Utilities' permits is groundless, he said. Therefore, he would have declared that the DEC, not EPA, has jurisdiction to complete the issuance of Utilities' contested permit conditions.

Congress required that qualified States, not EPA, must administer the entire program to assure there is local accountability for matters affecting localities.

Congress purposely mandated that qualified States must implement and administer the NPDES permit program. The present case is plainly one in which this policy must not be sacrificed. Here, EPA would require six enormous circular structures to be constructed in the Mid-Hudson Valley. They

* See Opinion, p. 5085, quoting §101(b) (33 U.S.C.A. §1251(b)).

would be highly visible.* They would use up energy equivalent to 720,000 barrels of oil each year, enough oil to heat over 15,000 homes annually. They would add over \$100 million annually to the cost of electricity in this region for almost 40 years (JA 78-79). A balance must be struck by the responsible agency to decide the competing factors of cost, environmental protective measures, and aesthetics.

It is not, of course, the task of this Court to decide whether such cooling towers should, or should not, be built, whether some less expensive mitigating measure should be required to further protect fish, or whether nothing further should be required.** But it is this Court's solemn duty to implement the will of Congress insofar as the Constitution permits.

Congress has spoken clearly. It mandated that the decision whether these cooling towers must be built, or whether some alternative may be preferable, is a decision to be made by the qualified State agency. In short, Congress has said that if the people of New York and its Hudson Valley are to look at, pay for, and incur the energy penalty of six cooling

* As Judge Brieant put it, the Mid-Hudson would no longer be the Rhine of America, it would become the Nile of America with cooling towers substituting for the pyramids (dissent, pp. 5098-9).

** Compare this Court's decisions in Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir., 1965); Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir., 1971); and Hudson River Fishermen's Association v. FPC, 498 F.2d 827 (2d Cir., 1974); Scenic Hudson Preservation Conference v. Callaway, 499 F.2d 127 (2d Cir., 1974).

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NOT ADMITTED TO THE NEW YORK BAR

November 14, 1978

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United States Court of Appeals
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United States Court House
Foley Square, New York 10007

Re: Central Hudson et. al. v. U.S.
Environmental Protection Agency
No. 77-4192 and 78-6032

Dear Mr. Fusaro:

Enclosed for filing with the Court of Appeals in connection with the above-captioned matter are twenty-five (25) copies of a "Petition for Rehearing in Banc and Petition for Rehearing" on behalf of Plaintiffs-Appellants Central Hudson Gas and Electric Corporation, Consolidated Edison Company of New York, Inc., Orange and Rockland Utilities, Inc., and the Power Authority of the State of New York.

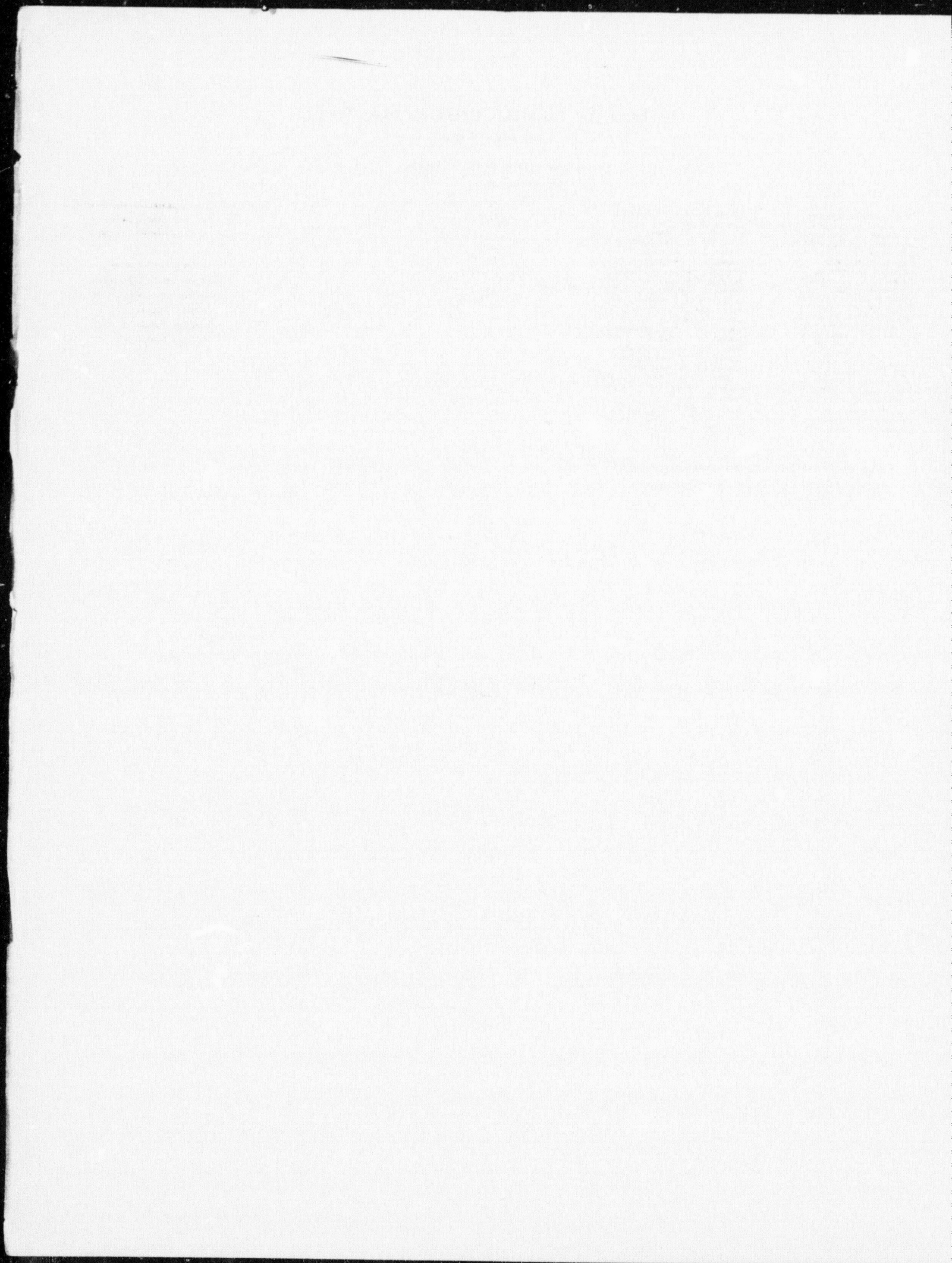
Copies have been served upon counsel to all parties to this matter.

Very truly yours,

Thomas E. Mark

Thomas E. Mark

TEM:GEP
Enclosure



towers, they should do so only upon the reasoned order of their own State officials. Congress expressly provided that they should not suffer these burdens at the behest of a non-elected distant bureaucracy in Washington, provided that their State government is qualified. As the majority opinion admits:

"[I]t is part of our philosophy of government that the government closest to the people should act in matters of importance in their daily lives to the greatest extent possible, to the exclusion of the federal administrator" (at p. 5068). Of course the EPA Administrator will neither have to look at nor pay for those cooling towers. And he will not have to answer to the people of New York for them.

However, the majority also suggests that competition between States "may have tended in the past to diminish the ardor of State and local officials for the elimination of water and air pollution caused by the generation of electricity" and that this makes federal supervision necessary (p. 5068). This belief then seems to impel the thought that transfer of Utilities' permits to DEC would cause delay, and thereby thwart the Act's objective. This leads two judges to conclude that Congress' requirement of State implementation should be "sacrificed".

This reasoning ignores the basic structure of the Act. Federal supervision is built into the Act, which gives EPA specific review power to assure that States adhere to

minimum standards.* This is how Congress decided to deal with "competition between states". The majority seems to lack faith in the State, and to doubt Congress' wisdom.

Congress considered and took into account the concern about interstate competition in the very fabric of the Act, through the mechanisms of uniform national standards,** and in its use of the words "issue" and "issuance" in various sections of the Act. And Congress finally compromised, after a long legislative struggle, that States, not EPA, were to be primarily responsible for permit issuance. It set up a structure to prevent any flagging of the State's "ardor" to reasonably control pollution. That structure may not be rebuilt to suit the taste of a reviewing court.

It is respectfully submitted that this written congressional policy, re-emphasized less than a year ago, is hardly frivolous. It is an expression of the people's will: Local costs and burdens, if imposed, should be imposed locally, and not by Washington. This Court must not sacrifice that policy on an imaginary altar of expediency.

Any lingering doubt that Congress intended EPA to "suspend the issuance" of Utilities' permits in 1975 evaporates by comparison of the words "issuance" in §402(c) with "issue"

* See §402(d) (33 U.S.C.A. §1342(d)). See §§301, 303, 304 (33 U.S.C.A. §§1311, 1313, and 1314).

** See duPont v. Train, 430 U.S. 112 (1977).

and "issuance" as used in §402(a) and §509(b)(1). Section 402(a) says that the "Administrator may, after opportunity for public hearing, issue a permit". Three Circuit Courts have held that the required public hearing is an adjudicatory hearing under the APA.* Adjudicatory hearings on the contested conditions of Utilities' permits are still in progress and will not be completed and decided until 1980.** Therefore the Utilities' contested permit conditions cannot have been "issued" by EPA under §402(a). Since they were not "issued" as of November 1975, Congress commanded EPA then to suspend the "issuance" under §402(c), and to let the State continue the process.

Further, the words "issuing" and "issuance" are used in §509(b)(1), which says:

"Review of the Administrator's actions... (F) in issuing or denying any permit under §402 may be had [in a Court of Appeals]. Any such application shall be made within ninety days from the date of such... issuance..."

Under the Act, "issuance" is a process over a period of time, beginning with the Administrator's processing of the application, and holding of hearings, and ends with his final decision based on the record. Review under §509(b)(1)(F) of actions in "issuing" a permit is allowed only by filing for review within ninety days after the issuance process is over.

* See U.S. Steel v. Train, 556 F.2d 822 (7th Cir., 1977); Marathon Oil Co. v. EPA, 564 F.2d 1253 (9th Cir., 1977); and Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, Docket No. 77-1284 (1st Cir., February 15, 1978).

** See infra p. 11.

On the other hand, Congress required in §402 that EPA suspend the issuance process if a State is found qualified to issue permits to applicants during the time EPA's issuance process is continuing.

The majority says (p. 5085):

"EPA's interpretation--under which uncontested provisions become part of an issued permit and contested permit provisions are stayed--does not conflict with the purposes of the statute, because the permits, as issued, consist solely of provisions to which no one has any objection".

This illustrates that the majority missed the point. The process of issuance now continuing relates to contested--not uncontested--permit conditions. The contested conditions are stayed and not issued.* It is these ongoing contested matters which must be transferred to DEC.

The result reached by the majority adds to duplication and delay because DEC, not EPA, must process Utilities' application for new permits before the present permits expire in 1980.

The majority incorrectly believed it was forced to choose between the Act's objective of maintaining the integrity of the Nation's waters (Act §101(a)), and Congress' policy that the States carry out "primary" responsibility to meet that objective (Act §101(b)). But these are not in conflict.

The majority was persuaded by EPA's protestations that delay, waste, and duplication would inevitably flow from a transfer of Utilities' permit proceedings to the State at this juncture. But as the dissent points out (p. 5096), this

* See 39 Fed. Reg. 27078 quoted by Judge Brieant at p. 5093 of his dissent.

specter is unreal and misleading. EPA staff is free to participate as a party in State hearings. Its many consultants could even become DEC staff witnesses. When summary judgment was first requested by Utilities in the District Court last year, evidentiary hearings had not even begun (JA 83), and they are only now nearing the close of EPA's cross examination of Utilities' direct case.* Although EPA Staff drafted the contested conditions in 1975, it will not even submit testimony in support of its position until spring 1979. Thereafter, cross of EPA and rebuttal can be expected to take until November 1979 or later. A final decision could not be expected until late 1980.

Note that the permits expire in March and July 1980 and new permit applications will need to be filed six months before those dates.** Even EPA admits that those applications for new permits must be filed with and processed by the New York DEC.***

* There have been 57 days of cross examination by EPA since December 6, 1977 and EPA is now resisting the Law Judge's order that its ongoing cross of Utilities direct case (filed July 11, 1977) be completed by December 1, 1978.

** The permits for Bowline, Roseton, and Indian Point 2 expire March 30, 1980. The permit for Indian Point 3 expires July 30, 1980 (see JA 113, 167, 194, 146). Section 402 (33 U.S.C. §1342) provides that permits shall be for no longer than 5 years.

*** See Memorandum of Agreement between EPA and DEC (JA 312) at Art. I, Para. 2: "After the date upon which the Administrator approves the State's permit program, all new applications for NPDES permits shall be directed to the Commissioner [of DEC]." See also EPA's proposed revised NPDES permit regulations, §122.32 (43 Fed. Reg. 37078 (August 21, 1978) at 37099).

So much, then, for waste and delay. The Act's objective will more easily be met by adherence to Congress' written direction of State implementation. If time is to be saved, the prudent choice is to shift this matter to DEC as soon as possible. Avoidance of further delay, we submit, is the primary reason to transfer this case to DEC--now.* That is one reason why Utilities commenced this action (JA 84-86).

The Act's deadlines for compliance are cited by the majority as a further reason for its position that the Act's objectives conflict with §402(c) (Opinion, p. 5084). The extended statutory deadline** for installing towers or other mitigation devices--if required--is well beyond expiration of the current permits. While the majority correctly notes that uncontested conditions of the EPA issued permits currently authorize operation of the plants, it ignores the fact that it is the contested permit conditions, requiring future compliance, which are in dispute and give rise to the hearing. If sensible policy is to prevail, it makes sense that the State, which must administer the permits in 1980, should decide on what will be needed after 1980.

* EPA, as far as we know, has only been able to complete one strongly contested case involving thermal discharges since 1972. See EPA Administrator's Decision on Remand in Matter of Public Service Co. of New Hampshire, Case No. 76-7 (Seabrook), August 4, 1978, following Remand in Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir., 1978), cert. denied, ___ U.S. ___, 12 ERC 1081 (Oct. 2, 1978).

** The 1983 date was changed to 1984. (See JA 589).

The decision is in conflict with recent decisions of the Supreme Court and the Ninth Circuit.

The majority's policy decision, moreover, conflicts with recent Supreme Court decisions. Two of them make plain that the will of Congress, not the preference of a reviewing court, must prevail. Thus, in Vermont Yankee Nuclear Power Corp. v. NRDC, cited by Judge Brieant, the Court said:

"The fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to reexamination in the federal courts under the guise of judicial review of agency action" (Vermont Yankee Nuclear Power Corp. v. NRDC, 46 U.S.L.W. 4301, 4311 (April 3, 1978)).

Likewise, the recent "snail darter" case, TVA v. Hill, 46 U.S.L. Week 4673 (U.S. June 15, 1978), cited by Judge Brieant, teaches that the words of an Act of Congress, not a Judge's perception of reasonableness, are controlling. Congress is free--subject to Constitutional limits--to write laws with which judges disagree.

Further, the majority misapplied Train v. Natural Resources Defense Council, 421 U.S. 60, 87 (1975) and E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 134-35 (1977). The issue here concerns the limits of EPA's statutory jurisdiction to act. Train and duPont, on the other hand, concern whether a particular implementing approach by EPA was "reasonable". The majority glosses over this basic distinction, and allows EPA to create its own jurisdiction by fiat, against the will of Congress.

Note further the Ninth Circuit's recent decision in Pacific Legal Foundation v. Costle, ___ F.2d ___ (9th Cir. Dkt.

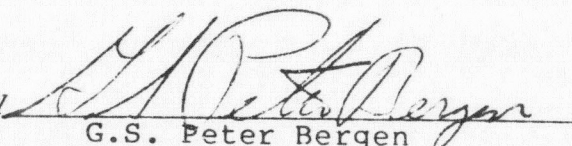
Nos. 77-2909; 77-3008, August 9, 1978). This case correctly holds that jurisdiction to issue permits for discharges beyond the three mile limit--beyond a State's territorial jurisdiction--lies in EPA, not the state. Thus, two outfalls of the City of Los Angeles which are 5 and 7 miles offshore must be licensed by EPA, but one outfall which is only one mile offshore must be licensed by California. This supports the Congressional mandate that State authority must be exercised to the statutory limits. See also EPA v. California, 426 US 200, 224-225, n. 39(1976).

WHEREFORE, Utilities urge this Court to grant this petition for rehearing and rehearing in banc. This Court should declare that New York DEC, not EPA, is the agency with jurisdiction to continue issuance of Utilities' permits.

Respectfully submitted,

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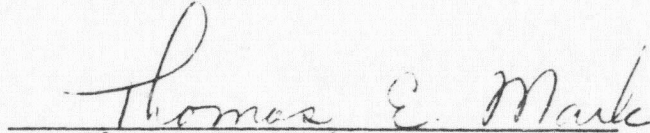
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I hereby certify that I have this day caused the foregoing Petition to be served upon counsel for all parties hereto by mailing two copies each of said Petition to said counsel at their offices, as follows:

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